SUPREME COURT OF THE UNITED STATES

July Term, 1978

No. 78-66

ROSE ANGELINO, et al.,

Petitioners,

v.

MABLE DODSON, THE UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT, et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

PETITION FOR REHEARING

OLAN B. LOWREY
1719 North Broad Street
Philadelphia, Pa. 19122

Attorney for Petitioners

INDEX

CITATIONS

Cases:

United States Constitution:

Federal Rules of Civil Procedure:

Proof of Service

I, Olan B. Lowrey, attorney for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 27th day of October, 1978, I served copies of the foregoing Petition for Rehearing of the Order Denying the Petition for Writ of Certiorari on the several parties thereto, as follows:

1. On the United States, by mailing three copies in a duly addressed envelope, with first class postage prepaid, to Walter S. Batty, Esquire, Assistant United States Attorney for the Eastern District of Pennsylvania, at Room 3310, United States Courthouse, Philadelphia, Pennsylvania 19106, and by mailing three copies in a duly addressed envelope, with first class postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the Philadelphia Redevelopment Authority, by mailing three copies in a duly addressed envelope, with first class postage prepaid, to Thomas D. Watkins, Counsel at the offices of the Philadelphia Redevelopment Authority, 7th floor, Legal Department, Philadelphia, Pennsylvania 19107.

3. On Mable Dodson, Dorothy Miller, Florence Hayes, Evelyn Powell and Henry Stroud, respondents, by mailing three copies in a duly addressed envelope, with first class postage prepaid, to their attorney of record, Harold R. Berk, Community Legal Services, Sylvania House, Juniper & Locust Streets, Philadelphia, Pennsylvania 19107.

OLAN B. LOWREY
Attorney for Petitioners
1719 North Broad Street
Philadelphia, Penna. 19122
(215) 787-7827
I.D. # 02375

SUPREME COURT OF THE UNITED STATES

July Term, 1978

No. 78-66

ROSE ANGELINO, et al.,

Petitioners,

v.

MABLE DODSON, THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

Introduction

Petitioners respectfully pray that the Court reconsider its order of October 2, 1978 denying their petition for a Writ of Certiorari to the

United States Court of Appeals for the Third Circuit.

Petitioners were denied the right to intervene to protect their economic interest in their homes from the negative impact of rezoning in order to place higher density low-income housing in among their homes. Their petition to intervene was denied on the grounds that inasmuch as the pleadings did not specify that the relocation housing sought must be in the urban renewal area where petitioners lived petitioners had no interest under Rule 24(a)(2) of the Federal Rules of Civil Procedure and in the alternative that although the petitioners had duly pleaded lack of knowledge of the litigation until such time as they sought to intervene their petition was untimely. Without evidence or allegation of knowledge by any nominal defendant the Courts below concluded that petitioners should have had knowledge of a lawsuit attended by no publicity and no notice to petitioners required by Rule 19, F.R.C.P. At the time of denial of the right to intervene the Trial Court had before it a Consent Decree specifying three

addresses in the community among petitioners homes where the low-income housing was proposed and a lis pendens notice as to those three sites had been initially filed of record pursuant to the petition. The Third Circuit Court of Appeals adopted the Trial Court opinion.

Grounds for Petition

As grounds for this petition, petitioners respectfully request this Court's consideration of the following substantial matters that were not presented in the Petition for Certiorari:

1. Since Petition for Certiorari was filed in the instant case the Fourth Circuit has joined the Sixth and Eighth Circuits as being in conflict with the Third Circuit with respect to the right of homeowners to intervene in litigation to protect their homes from economic injury through government sponsored construction.

2. The decision of the Third Circuit in the instant case is in direct conflict with a prior decision of the Third Circuit with respect to the issue

of standing to protect the economic value of homes from the threat of construction of low-income housing.

3. To deny petitioners the right to intervene will result in a violation of Article 3, Section 2 of the United States Constitution because without petitioners' participation in the litigation there is no bona fide defendant and therefore no case or controversy essential to the jurisdiction of the Federal courts.

Argument

1. Since Petition for Certiorari was made in the instant case the Fourth Circuit has joined the Sixth and Eighth Circuits as being in conflict with the Third Circuit with respect to the right of homeowners to intervene in litigation to protect their homes from economic injury through government sponsored construction.

The Fourth Circuit decision of Fleming v. Citizens for Albemarle, Inc., 577 F.2d 236 (4th Cir. 1978) recognized standing for property owners to

intervene as of right under F.R.C.P. 24(a)(2) to protect themselves against rezoning for high density housing. The economic injury asserted was a possible loss of potable water as a result of construction of a planned residential development involving rezoning to permit, as in the instant case, greater density in the neighborhood. The intervenors had petitioned nine days after a court order was entered approving the rezoning. The Trial Court had denied the right to intervene but was reversed by the Fourth Circuit in part on the grounds that the Trial Judge had in effect participated actively in concert with the opposition by bringing pressure on the government officials upon whom the petitioners had relied. The Fourth Circuit concluded that the petitioners had had no way of knowing that this would be done and therefore that their petition to intervene to protect their property interests nine days after judgment was entered was appropriate. The Court specifically addressed the issue of interest under 24(a)(2) and concluded that fear by the residents and property owners that the planned

community would endanger the purity and potableness of the water in the county reservoir was a sufficient interest:

> "The facts demonstrate incontrovertibly that appellants possessed, as just observed in referring to Rule 24(a)(2), such "an interest relating to the property or transaction" in suit that "the disposition of the action" could "impair or impede" their ability to protect their concern. Admittedly, the two corporations were composed of upwards of 1000 residents or property owners in the County who, not without reason, feared that the "planned community" would endanger the purity and potableness of the water in the Albemarle County Reservoir."

It will be recalled that the Sixth Circuit in Joseph Skilken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), vacated and remanded, 429 U.S. 1068 (mem.) prior decision adhered to, 558 F.2d 1283 (6th Cir.), cert. denied, ____ U.S. ____, 98 S.Ct. 611 (1977) under a set of facts almost identical to those of the instant case involving rezoning for low-income housing it was held that citizens had a right to intervene under Rule 24 F.R.C.P. In Planned Parenthood v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977) the Eighth Circuit relied on Skilken

in holding that homeowners had standing under 24(a)(2) F.R.C.P. to intervene to protect their economic interest in their homes from the feared injury that might result from the erection of an abortion clinic in the neighborhood. The Court stated:

> "In order to prevent what they view as an incipient erosion of their property values, the applicants must participate in this litigation, and must be given the opportunity to present their views to the Court in their endeavor to uphold the ordinance as a legitimate and constitutional exercise of municipal power." (p. 869)

2. The decision of the Third Circuit in the instant case is in direct conflict with a prior decision of the Third Circuit with respect to the issue of standing to protect the economic value of homes from the threat of construction of low-income housing.

In determining that petitioners had no legal interest under Rule 24(a)(2) that might be affected by the introduction of low-income housing into petitioners' community the Third Circuit is totally disregarding its own legal precedent respecting standing established in Shannon v. United States Department of Housing & Urban Development, 436 F.2d 809

(3rd Cir. 1970). In Shannon the issue was standing to initiate a lawsuit to stop low-income housing from being placed in the neighborhood. Both white and black residents of a Philadelphia neighborhood in an urban renewal area brought suit to challenge HUD's revision of an urban renewal plan which contemplated owner occupied dwellings. The revision called for government sponsored rental dwellings. The only differences between the facts in Shannon and those in the instant case are that in Shannon some of the persons seeking standing were black. The issue was initial standing rather than the interest that might be affected under Rule 24(a)(2) and in the instant case the zoning is being changed.

The first two factors are regarded as immaterial under the law and the third is an additional reason for granting the right to intervene. Regrettably, it is quite possible that the standing recognized in Shannon did in fact bear on the race of the complaintants. It is difficult to otherwise en-

vision why in the instant litigation individuals making exactly the same claims of desiring to protect their homes from economic loss resulting from government low-income housing have been said to have no legally protectable interest. The reason given by the courts below to the effect that the complaint did not call for housing in Society Hill would appear to be specious at best. The accompanying lis pendens notice with the same caption and court number and the ultimate consent decree did give addresses within Society Hill.

In Shannon the basis for injury in fact was the allegation that the concentration of lower income black residents in the rent supplement project in their neighborhood would "adversely effect not only their investments in homes and businesses, but even the very quality of their daily lives." (p. 818) This language is essentially identical to that pleaded by petitioners in the instant case in their Motion to Intervene as Defendants:

> 'The interest petitioners seek to protect "is an economic interest in the value

> of their homes. It is an unfortunate though well-established fact that government subsidized housing is extremely injurious to property values wherever it is placed."

In Shannon the Third Circuit reasoned that

> "[t]he plaintiffs here, perhaps more than the displaced and relocated former residents or the potential occupants of new housing are vitally affe ted by the adequacy of the particular program of community improvement of a residential community with decent homes and a suitable living environment which they seek to challenge. (p. 818)"

In the instant case, the Third Circuit in contradiction of the principles stated above denied the right to intervene of those homeowners in the community where the low-income housing was and is proposed while it simultaneously held open in the same order the right of any additional plaintiffs to seek to intervene in order to establish their right to housing in the community. Rather than recognize that white homeowners had perhaps a greater right than those seeking to return to the community to live in low-income housing the Court held they had no right though Rule 24(a)(2) of the Federal Rules of Civil Procedure clearly states

that there is such a right ·

> "...when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest...."

The Court below acknowledged that the applicants' interest was not adequately represented by existing parties, totally disregarded the well-pleaded statement to the effect that applicants had no knowledge of the proceeding until such time as they sought to intervene and thereby denied to petitioners in what can only be described as a severe miscarriage of justice the right to seek to protect their homes from the debilitating effects of zoning changes to achieve greater density as well as the negative effects of government sponsored low-income housing. It is respectfully submitted that there is no difference in substance between Shannon and the existing case. The refusal of the courts, below to abide by fundamental principles of law incline petitioners to respectfully suggest that the

courts are involved in their own version of an affirmative action program, that the refusal to follow the Shannon decision stems in part from the fact that none of the petitioners are minority individuals.

If the judicial system is to maintain the respect that is essential to its effective functioning, the judges on all benches must comply with the law as written. In the instant litigation it is quite possible that petitioners could have lost on the merits, that the zoning could be changed because of a showing of bias, that the Court might construe a violation of the Fair Housing Act so as to legally justify changing of the zoning to impose low-income housing in a fine community. But, here the lower courts have by refusing to abide by their own precedent denied to citizens their day in court to litigate the obvious and significant issues presented.

In both cases it is stressed that we are dealing with an urban renewal area. In both cases some of those to allegedly benefit from the government sponsored low-income housing had formerly lived in the neighborhood. In both cases the interest sought to

be protected was an economic interest in the homes of the individuals. There is no material distinction.

In Resident Advisory Board v. Rizzo, 425 F.Supp. 987 (E.D.Pa. 1976), aff'd as modified, 564 F.2d 126 (3rd Cir. 1977) cert. denied, 435 U.S. 908 (1978) citizens protesting economic loss to result from low-income housing in their communtiy were permitted to intervene without comment.

3. To deny petitioners the right to intervene will result in a violation of Article 3, Section 2 of the United States Constitution because without petitioners participation in the litigation there is no bona fide defendant and therefore no case or controversy essential to the jurisdiction of the Federal Courts.

In this litigation there is no case or controversy. The primary parties are those individuals seeking government sponsored low-income housing for themselves, the Department of Housing and Urban Development and the City of Philadelphia. Neither the Department of Housing and Urban Development nor the City of Philadelphia are bona fide defendants in the litigation.

The City of Philadelphia is dependent upon the Federal structure for funding through the Community Development Program sponsored by the Department of Housing and Urban Development. The Department of Housing and Urban Development in turn is actively sponsoring low-income housing in communities in the City of Philadelphia and in the instant case has specifically sought to induce the City of Philadelphia to permit low-income housing to be placed in Society Hill. The form of the inducement is in the context of a threat to terminate or diminish funding to the City of Philadelphia in the event that every effort is not made to achieve HUD's stated goals.

In a letter written by the Department of Housing and Urban Development on May 13 of 1977 at a time when it was posing as a defendant in this lawsuit and purporting to represent the interests of homeowners concerned about the value of their homes and the quality of their life HUD wrote a letter to Frank Rizzo, Mayor of the City of Philadelphia, containing the following threat and the following suggestion as

to how to avoid that threat being carried out. The threat read:

> "The City should be aware that failure to take all necessary steps within its powers to produce low-income housing outside areas of minority concentration or failure to implement the housing plan pursuant to the City's commitment could lead to a reduction of funds during this community development block grant program year or a loss of funds for the next year." (p. 2)

The suggestion as to how to avoid the threat read:

> "We encourage the City to continue to move ahead with the subsidized units in the Washington Square West NDP area (Society Hill) related to the settling of the Mable Dodson case and to help provide housing choice for low-income families." (p. 3) (emphasis added)

It is believed axiomatic that where there is no bona fide defense there is no case or controversy under Article 3, Section 2 of the Constitution and therefore no grounds for the Court to act. This has been an established principle from the date of the Constitution and was given judicial recognition and reinforcement as early as Lord v. Veazie, 49 U.S. (8 How.) 251 (1850). In Lord Veazie had sold the stock in a corporation to Lord and covenanted that the corporation had the right to use the Penobscot River for

navigation. An action on the covenant was then docketed by consent of both parties. The issue was whether the covenant was enforceable. The Supreme Court found that the contract for the sale of the stock was made for the purpose of instituting a lawsuit and there was no real dispute between the parties because their interest was identical. The Court stated:

> "...the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to the suit, who had no knowledge of it while it was pending in the Circuit Court, and no opportunity of being heard there in defence of their rights. And their conduct is the more objectionable, because they have brought the question upon a statement of facts agreed on between themselves without the knowledge of the parties with whom they were in truth in dispute, and upon a judgment pro forma entered by their mutual consent without any actual judicial decision by the court." (p. 254)

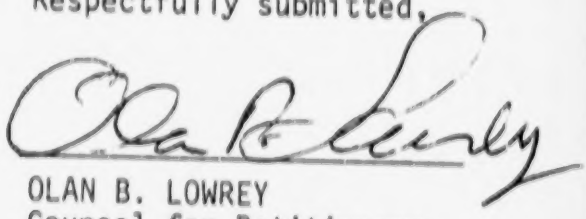
The Court then continued:

> "The objection in the case before us is... that the plaintiff and the defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided

in the manner that both of the parties to this suit desire it to be." (p. 255)

No language could have been written more directly related and appropriate to the instant litigation where the only parties with an adverse interest had no knowledge until they sought to intervene and where they and they alone possessed an interest adverse to that held jointly by the plaintiffs along with the misaligned Department of Housing and Urban Development and City of Philadelphia.

Respectfully submitted,



OLAN B. LOWREY
Counsel for Petitioners